SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 9 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 786

RALPH B. CARNES and ROGER W. SMALLWOOD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION AND BRIEF ON BEHALF OF PETITIONERS, RALPH B. CARNES AND ROGER W. SMALLWOOD.

ROBERT E. ANDREWS,
FRANK B. STOW,
P. O. Box 1974,
Gainesville, Georgia,
E. C. BRANNON, JR.,
Gainesville, Georgia,
ROBERT B. THOMPSON,
Jackson Building,
Gainesville, Georgia,
Attorneys for Petitioners.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Reference to Official Report	1
Grounds of Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of the Case	4
Argument in Support of Allowance of the Writ	6
Conclusion	11
Appendix—	
Judgment	A1
Order Denying Rehearing	A1
Order Extending Time to File Petition for Writ of Certiorari	A2
Opinion of United States Court of Appeals for the Fifth Circuit	A3
Certificate of Service	A12

Table of Cases

Boyd v. *United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746, 752	9
Goldman v. *United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322	7, 8
Goldstein v. *United States*, 316 U.S. 114, 121, 62 S. Ct. 1000, 86 L. Ed. 1312	7
Irvine v. *California*, 347 U.S. 128, 131, 74 S. Ct. 381, 98 L. Ed. 561, 568	9
Nardone v. *United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314	2, 3
Rathbun v. *United States*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134	2, 3, 8, 10

Reitmeister v. *Reitmeister*, 2 Cir., 162 F.2d 691 6, 7

Silverman v. *United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 2, 3, 8, 9

United States v. *Fallon*, 112 F.2d 894 7

United States v. *Polakoff*, 2 Cir., 112 F.2d 888 6, 7, 10, 11

STATUTES

Communications Act of 1934, Section 605, 47 U.S.C. 605 3, 6

Rules of the Supreme Court, Rule 19 (1) (b) 2

28 U.S.C. 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

No.

RALPH B. CARNES and ROGER W. SMALLWOOD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION AND BRIEF ON BEHALF OF PETITIONERS, RALPH B. CARNES AND ROGER W. SMALLWOOD.

(a)

REFERENCE TO OFFICIAL REPORT.

The opinion sought to be reviewed by the petition for writ of certiorari was rendered by the United States Court of Appeals for the Fifth Circuit and is reported as the case of Ralph B. Carnes and Roger W. Smallwood v. United States of America, 295 F.2d 598. A copy of the official opinion is appended hereto.

GROUNDS OF JURISDICTION.

The opinion sought to be reviewed, entitled Ralph B. Carnes and Roger W. Smallwood v. United States of America, Number 18421, is dated October 20, 1961. A petition for rehearing was denied, without opinion, on January 11, 1962. An order was entered by this Court on February 1, 1962, granting an extension of time within which to file petition for certiorari until March 12, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of the Supreme Court Rules, Rule 19 (1) (b), Title 28, U.S.C.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal law in the administration of criminal justice, which, while already settled by this Court, is in direct conflict with prior decisions of this Court, to wit: *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734; *Nardone v. United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314; and *Rathbun v. United States*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134; and has, by its decision in the case forming the basis for the petition for writ of certiorari, so far departed from the accepted and prescribed course of judicial proceedings as to require the exercise of this Court's power of supervision.

The United States Court of Appeals for the Fifth Circuit has held in the case here sought to be reviewed, that evidence obtained by Federal agent, with the use of a recording device attached to a telephone, by recording a telephone conversation without the consent or knowledge of the sender is admissible in evidence in a Federal prosecution and that the procurement and admission of such

evidence does not violate the Communications Act of 1934, Section 605, 47 U.S.C. 605.

This decision is in sharp conflict and direct conflict with the decisions of this Court in the cases of *Silverman* v. *United States, supra*; *Nardone* v. *United States, supra*; and *Rathbun* v. *United States, supra*, and numerous other decisions of various Circuit Courts of Appeal.

(c)

QUESTIONS PRESENTED.

Does the Communications Act of 1934, Section 605, 47 U.S.C. 605, render inadmissible as evidence in a federal criminal proceeding tape recorded telephone conversations of a defendant obtained by a federal agent by attaching a recording device to a telephone without the knowledge or consent of the sender defendant?

(d)

STATUTE INVOLVED.

47 U.S.C. 605.

"Section 605. *Unauthorized publication or use of communications.*

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be

passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress." (June 19, 1934, c. 652, Section 605, 48 Stat. 1103.)

(e)

STATEMENT OF THE CASE.

At the January Term, 1960, of the United States District Court for the Northern District of Georgia, Atlanta Division, before Honorable William Boyd Sloan, Judge, there came on for trial the case of the *United States of America* v. *Ralph B. Carnes, Roger W. Smallwood*, and others, same being a five-count indictment wherein said Defendants were accused of the offense of conspiracy and other offenses against the United States.

To said indictments, the Defendants pleaded not guilty, and on said date, said case proceeded to trial. After all the evidence, both oral and documentary, was in, and both sides had closed; and the Jury charged by the Court, the Jury returned a verdict finding the Appellant, Ralph B. Carnes, guilty on Count One (1), the conspiracy count, and finding Appellant, Roger W. Smallwood, guilty on Counts One (1), Two (2) and Four (4) of said indictment. Said Appellants were, in due course, sentenced by the Court.

During the course of the trial, the United States presented a witness by the name of John E. Wurtele. This witness testified that he is a special investigator with the Alcohol and Tobacco Tax Division of the United States, and as such took part in the investigation of the case against the Appellants herein; that during the investigation, he made arrangements to purchase whisky and was to purchase same from Appellant Carnes; that the arrangements were made through other Co-defendants. Said witness testified that he had made certain tape recordings of telephone conversations he had with Appellant Carnes, during a time that the said Federal agent was posing as a co-conspirator under the name of Johnny Miller.

Said witness testified that when he made the tape recordings of said telephone conversations, that he used a small midget tape recorder connected to the telephone ear piece that would record telephone conversations both ways. The witness identified United States Exhibit Number 6, as the recorded telephone conversations thus obtained between him and Appellant Carnes, relating to the purchase of whisky. The Court admitted into evidence the recorded telephone conversations thus obtained and permitted same to be played in the presence of a Jury, over the objections of attorney for Appellants.

After the verdicts of guilty were returned, as aforesaid within the time prescribed by law, Appellants, Ralph B.

Carnes and Roger W. Smallwood, filed their appeals to the United States Court of Appeals for the Fifth Circuit for review. The United States Court of Appeals for the Fifth Circuit rendered the opinion appended hereto and, in due course, motion for rehearing was filed and denied. The case is now before this Court for review.

(f)

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT.

The tape-recorded telephonic conversations here in question were procured by federal agent Wurtele by means of a recording device attached to the earpiece of a telephone through which he placed a call to petitioner Carnes. The agent, having previously introduced himself to petitioners as Johnny Miller, a person connected with the illicit liquor traffic, in his pretended character, called Carnes for the purpose of eliciting from Carnes incriminating statements which could be intercepted and recorded for future use in prosecuting petitioners and others. The Court of Appeals, relying upon certain decisions of this Court hereinafter discussed, held that the method of procuring the recording did not constitute an "interception"; thus, such evidence did not fall within the prohibitions of Section 605, Title 47, United States Code.

In ruling as it did, the Court recognized that its decision was in direct conflict with that of the Second Circuit in *United States* v. *Polakoff*, 2 Cir., 112 F.2d 888, and *Reitmeister* v. *Reitmeister*, 2 Cir., 162 F.2d 691, but felt constrained to follow what it construed to be the "increasing weight of authority." Under facts not dissimilar to those in the present case, the Second Circuit, in *United States* v. *Polakoff*, *supra*, at page 889 of the Reporter, held:

"* * * We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or, as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases, and the sender will often give consent, express or implied, to the interposition of a listener. Party lines are a good illustration; and it would be unwise to try in advance to mark the borders of such implications. Here, however, we need not be troubled by niceties, because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally. Violation of the privilege, we are admonished, is so grave a dereliction as to be 'destructive of personal liberty' (Nardone v. United States, 302 U.S. 379, 383, 58 S. Ct. 275, 277, 82 L. Ed. 314) and if it is not to be a sham and illusion, it must protect its possessor at least against such intrusions. 'A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose * * *."

This principle was followed by the Court in another decision rendered on the same day, *United States* v. *Fallon*, 112 F.2d 894, where the recording device was interposed in the telephone circuit in the house of the prosecution's chief witness. In *Goldstein* v. *United States*, 316 U.S. 114, 121, 62 S. Ct. 1000, 86 L. Ed. 1312, footnote 13, this Court gave limited recognition to the *Polakoff* case, that is, to the extent that it held that both parties to a telephone conversation are senders within the meaning of the statute. At the same term, in *Goldman* v. *United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, footnote 6, this Court cited *Polakoff* with approval. Thereafter, the Second Circuit, referring to those two decisions of this Court, in *Reitmeister* v. *Reitmeister*, 2 Cir., 162 F.2d 691, 694, reaffirmed its ruling in *Polakoff*, stating:

"The message must be 'intercepted' by some mechanical interposition in the transmitting apparatus itself, for the message, though sent over the wire, is not immune from disclosure: but only the interjection of an independent receiving device between the lips of the sender and the ear of the receiver. In the case at bar, Louis recorded the talks which passed along the transmitting wire by means of an instrument, interjected in that wire (he had an extension in his own separate office leading from the main wire, and to the receiver at this extension he could attach the recording machine); and we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire, made ad hoc."

Not persuaded by these authorities, the Fifth Circuit in the present case felt that this Court has forecast a different ruling by its decisions in *Goldman* v. *United States*, *supra*; *Rathbun* v. *United States*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134; and *Silverman* v. *United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734. The *Goldman* case and the *Silverman* case have no application here, as they both involved the use of a listening device which was in no way connected to the telephone circuits. The device used in each case merely enabled the listener to overhear conversations of one party to a telephone communication because it was affixed to the wall of a room in which the conversation took place.

The *Goldman* case actually sustains the contentions urged here by the petitioners. In that case, federal agents, by use of a detectaphone device, listened to various conversations carried on in an adjoining room, some of which were telephone conversations. In holding that this method of eavesdropping did not violate Section 605, Title 47, United States Code, this Court observed:

"The protection intended and afforded by the statute is of the means of communication and not of

the secrecy of the conversation. Section 3 embodies the following definition: '(a) Wire communication, or communication by wire, means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.' *What is protected is the message itself throughout the course of transmission by the instrumentality or agency of transmission.*" (Emphasis supplied).

In its opinion in the *Silverman* case, in ruling that the statute here involved was not applicable, the Court observed that it had previously held, in *Irvine* v. *California*, 347 U.S. 128, 131, 74 S. Ct. 381, 98 L. Ed. 561, 568, that where the apparatus of the officers was not in any way connected with the telephone facilities and there was no interference with the communications system, there was no interception of a message within the meaning of the statute. We think this most significant, for in the present case, the apparatus of the officers which intercepted the message *was* connected with the telephone facilities and there *was* interference with the communications system.

While the recording device was attached to the earpiece, rather than to some more remote portion of the communications system, this distinction is not too fine a one to draw. As stated in the *Silverman* case, with respect to the spike mike, quoting from *Boyd* v. *United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746, 752:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

Likewise, we urge that the support which the Fifth Circuit relied upon in *Rathbun* v. *United States*, *supra*, is unfounded. That case was based upon the factual evidence as follows: A person named Sparks informed police officers that he was threatened by another and was expecting another telephone call from that person. He requested that police officers listen in on an existing and regularly used extension in the event the call came. The call came; it was placed by the accused and he talked to the person he intended talking to, that is, Sparks. By the prearrangement, the police officers overheard the conversation over the extension telephone. This Court held that such conduct did not violate the relevant statute, "because there has been no interception as Congress intended the word to be used."

In that case the caller was the party who objected to the use of the evidence. He had placed the call and talked to the person he intended communicating with and the officers overheard the conversation at the request of the person called. There was no mechanical device interposed and no recording of the conversation made by the use of such intercepting device. In the present case, the caller represented himself to be "Johnny Miller" when he was in reality a federal agent named John E. Wurtele. The federal agent himself placed the call for the sole purpose of intercepting and recording the conversation with the device designed for that purpose, all unknown to petitioners.

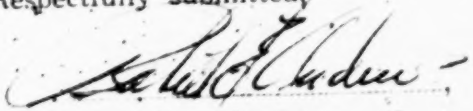
As was pointed out by the Court in *Rathbun*, the extension over which the officers listened had not been installed just for that purpose, but was a regular connection, previously placed and normally used. It is also noted that the parties in that case conceded that either party to the conversation had a right to record and publish it. In referring to this concession, the Court cited *United States* v. *Polakoff*, *supra*, which so holds. As hereinbefore dis-

cussed, that case also holds, immediately following the quotation contained in the footnote (footnote 7), of the Court's opinion, that "no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender'". Such is the case we have here. Just as in the *Polakoff* case, the call was made by the prosecuting agent with the recording device attached to the earpiece for the sole purpose of intercepting the message.

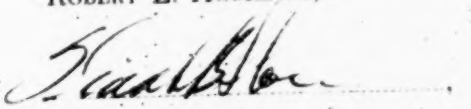
CONCLUSION

The judgment of the trial Court was in error and it should have been reversed by the Court of Appeals. For the reasons stated herein, this Court should grant the Writ of Certiorari and reverse the judgment of the Court of Appeals for the Fifth Circuit.

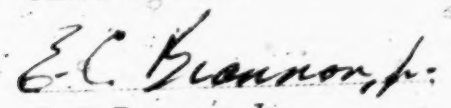
Respectfully submitted,



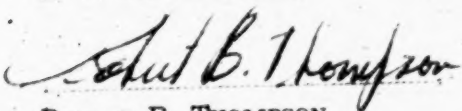
ROBERT E. ANDREWS,



FRANK B. STOW,



E. C. BRANNON, JR.,



ROBERT B. THOMPSON,

Counsel for Petitioners.

JUDGMENT

Extract from the Minutes of October 20, 1961.

RALPH B. CARNES and ROGER W. SMALLWOOD,

No. 18421 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Disfrict Court in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

RALPH B CARNES and ROGER W. SMALLWOOD,

No. 18421 versus

UNITED STATES OF AMERICA.

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1961

RALPH B. CARNES AND ROGER W. SMALLWOOD,
Petitioners,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

March 12th, 1962.

/s/ Hugo L. Black,
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of February, 1962.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18421.

RALPH B. CARNES and ROGER W. SMALLWOOD,
Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(October 20, 1961)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge. This is an eavesdropping case, a problem that keeps bobbing up before the federal courts. Is evidence obtained by recording or by listening to a telephone conversation with the consent of one party but without the knowledge or consent of the other legally admissible evidence under Section 605 of the Federal Communications Act? The appellants seek reversal of criminal convictions based in part upon taped recordings of telephone conversations, asserting that stripped of this inadmissible evidence the judgment lacks substantial support. We hold that the evidence was properly admitted.

The appellants, Ralph B. Carnes and Roger W. Smallwood, with seven others, were indicted for violations of the United States Internal Revenue liquor laws during the

fall of 1958.[1] The indictments followed a long period of investigation by state and federal officers. September 10, 1958, the officers raided a large non-registered still located adjacent to property owned by Smallwood. They discovered 403 gallons of non-taxpaid liquor and rounded up several persons implicated in the operation of the still. Destruction of the still merely slowed down operations. September 20 Atlanta policemen found John S. Whitley, one of the defendants previously arrested, driving an automobile containing 158 gallons of non-taxpaid whiskey. During this period numerous telephone calls were made between a store owned by Carnes and the Smallwood residence. In October, Federal Investigator Wurtele initiated an underground contact with the defendants in an attempt to purchase whiskey from Carnes. October 7, Wurtele met Carnes and arranged a purchase at three dollars a gallon. During the next few days the investigator made several purchases of whiskey from various members of the group later indicted. On one occasion he recorded a conversation with Whitley by means of a pocket tape recorder. October 27 and 29, Wurtele recorded two telephone conversations he had with Carnes by means of an attachment placed on the earpiece of his telephone. October 30 other officers, using information obtained through Wurtele's conversation with Carnes, located and destroyed a second still. A third still was seized November 26. These prosecutions were then initiated.

1. Count One charged a conspiracy running from August 1, 1958, until November 30, 1958. Four other counts charged certain defendants with substantive offenses committed during the period of the conspiracy. Carnes was convicted on the conspiracy count. Smallwood was convicted of the conspiracy and on Counts Two and Four, which charged the possession of non-taxpaid whiskey and a non-registered distillery, respectively, on September 10, 1958. Carnes received a sentence of four years and Smallwood three years.

The recorded conversations were introduced at the trial over objections from the defendants. It is not disputed that the evidence was sufficient to support the decision, if the recorded conversations were properly admissible.

The Federal Communications Act of 1934, in part, provides that:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *" 47 U.S.C.A. § 605.

The Supreme Court has held that evidence obtained in violation of this law is not properly admissible in court proceedings. *Nardone v. United States*, 1937, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314; *Weiss v. United States*, 1939, 308 U.S. 321, 60 S. Ct. 266, 84 L. Ed. 298.

Shortly after these cases were decided, a division of opinion developed in lower courts in interpreting the scope of activities prohibited by the statute. The dispute centered on whether the words "*intercept any communication*" applies when one party to a conversation, without the knowledge of the other, allows a third person to listen to the conversation or records it by a device attached at or near the consenting party's end of the telephone line. In a 1940 case the Second Circuit, in an opinion by Judge Learned Hand, held that a recording made from an exten-

sion phone fell within the statutory ban and was inadmissible. The court said:

> "The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts. We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases, and the sender will often give consent, express or implied, to the interposition of a listener. Party lines are a good illustration; and it would be unwise to try in advance to mark the borders of such implications. Here, however, we need not be troubled by niceties, because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally." *United States* v. *Polakoff*, 2 Cir., 1949, 112 F.2d 888, 889.

Under this view "each party to a conversation is a sender as well as a receiver whose consent to interception is required before a communication may be divulged." *United States* v. *Hill*, S.D.N.Y., 1957, 149 F. Supp. 83, 34.

Courts taking the opposite approach reasoned that "intercept" required the listening to occur *between* the parties to the conversation, a condition not satisfied when a recording is made at the site of one party and with his consent. Thus, in *United States* v. *Yee Ping Jong*, W. D. Penn., 1939, 26 F. Supp. 69, 70, the court admitted a phonographic recording made by attachment of a device to the telephone wire inside the house of a narcotic agent's associate from which a telephone call was made. The conversation "between the defendant and his interpreter", the court said,

"was not obtained by a 'tapping of the wire' between the locality of call and the locality of answer by an unauthorized person, but was, in effect, a mere recording of the conversation made by a participant."

The Supreme Court gave this interpretation a boost in *Goldman* v. *United States*, 1940, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322. Federal agents, to overhear a conversation in a business office, gained access to an adjoining room and inserted a detectaphone in a small aperture in the partition wall with a wire leading from the detectaphone to earphones. The Court held Section 605 inapplicable because no interception at all had occurred; the officers had overheard the speaker directly. In discussing the Communications Act the Court stated: "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation * * *. What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. As has rightly been held, [citing *United States* v. *Yee Ping Jong*] this word ["intercept"] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver."

The Second Circuit has held, however, that the language in Goldman did not call for reversal of its earlier decision; it continued to exclude all testimony as to telephone conversations listened to without consent of the speaker. *Reitmeister* v. *Reitmeister*, 2 Cir., 1947, 162 F.2d 691; *United States* v. *Hill*, S.D.N.Y., 1957, 149 F. Supp. 83. Most courts follow Yee Ping Jong and Goldman and adopt the narrower interpretation of Section 605. See, for example: *Ladrey* v.

Commission on License to Practice, Etc., D. C. Cir., 1958, 261 F.2d 68 (en banc), *cert. den'd* 358 U.S. 920 (listening on an extension line); *United States* v. *Bookie*, 7 Cir., 1956, 229 F.2d 130 (officers standing near receiver to hear conversation); *United States* v. *White*, 7 Cir., 1956, 228 F.2d 832 (extension); *Flanders* v. *United States*, 6 Cir., 1955, 222 F.2d 163 (extension); *Barbour* v. *United States*, D.C., 1958, 164 F. Supp. 893, *aff'd p.c.*, D.C. Cir., 1959, 264 F.2d 375, *cert. den'd* 360 U.S. 905 (extension); *United States* v. *Pierce*, N.D. Ohio, 1954, 124 F. Supp. 264, *aff'd p.c.*, 6 Cir., 1955, 224 F.2d 281 (extension); *United States* v. *Sullivan*, D.C., 1953, 116 F. Supp. 480, but see opinion affirming on other grounds, D.C. Cir., 1955, 219 F.2d 760 (listening near the receiver); *United States* v. *Lewis*, D.C., 1950, 87 F. Supp. 970 (recording made by device attached to telephone and, on separate calls, stenographic records made by person listening over extension phone). See also *Rayson* v. *United States*, 9 Cir., 1956, 238 F.2d 160. But see *United States* v. *Stevenson*, D.C., 1954, 121 F. Supp. 274 (conversation recorded by device attached to wiring of telephone bell box was held inadmissible) in which the court stated: "Both in space and time, the taking in this instance was before the arrival of the communications at the destined place." 121 F. Supp. at 277.

The Supreme Court, in *Rathbun* v. *United States*, 1957, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134, stamped its approval on the conclusion supported by this increasing weight of authority. Police officers were allowed to listen on an extension line to a telephone conversation in which the defendant threatened the life of the man he had called. In holding the testimony admissible, the Supreme Court scotched the theory that the consent of each party to a conversation must be obtained before a communication may be divulged. The Court held:

"The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates § 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose." 355 U.S. at 110-11.

Two major principles may be extracted from these cases. First, testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation is not inadmissible under Section 605. Second, such testimony does not become inadmissible simply because it was recorded by an electrical or mechanical device attached to an extension phone or telephone wiring at the locality of the consenting party. The significant fact in the approved eavesdropping cases is that a third person is listening to a conversation directly, or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard. Both the consenting party and the third party would be free to divulge the contents of the conversation in the courtroom or elsewhere; the only function served by the recording is to preserve a permanent and accurate record of the conversation. In the case at bar this point is particularly clear since the recording was made by the very individual who was participating in the conversation. Taking a sensible view of it, the only difference between a person testifying to a conversation in which he participates or overheard and a recording of the conversation is that the recording has

the advantage of furnishing trustworthy evidence (assuming a showing that the tape has not been tampered with).

The Supreme Court has now added a caveat to the Goldman principle of protected eavesdropping. *Silverman v. United States*, 1961, U.S. , 81 S. Ct. 679, 5 L. Ed. 2d 734. In that case police officers inserted a "spike mike"[2] through a party wall so that it came in contact with a heating duct, converting the heating system into a giant microphone running the entire house. The Court distinguished Goldman on the ground that in Goldman there was no physical invasion of a constitutionally protected area and therefore no violation of the Fourth Amendment. At the same time, the Court's Parthian shot was to declare, "we decline to go beyond [Goldman] by even a fraction of an inch". The Court held that eavesdropping accomplished by such "a physical intrusion" as a "spike mike" into a "constitutionally protected area" is "beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights". The Supreme Court agreed with the Court of Appeals, however, that Section 605 was inapplicable in that it could not be said that the police officers "intercepted" the telephone conversations. In the instant case the appellant does not rely on the Fourth Amendment; the facts show no physical intrusion into a constitutionally protected area and less invasion of privacy than there was in Goldman.

The Communications Act goes a long way to safeguard individual liberty, the right of privacy, and the insulation of one's home from Big Brother intrusions of a police state. We must expect and be alert to the increasing danger to

---

2. A "spike mike" is an electronic listening device consisting of a microphone attached to a foot-long spike, with an amplifier, a power pack, and earphones.

these rights as the electronics industry continues its development. But the admissibility of conversations recorded with the consent of a party to the conversation is not such an invasion of privacy that its disadvantages should outweigh its value as evidence in the search for truth in a criminal trial. As the Court in Rathbun stated, "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." 355 U.S. at 111. This risk does not catch people by surprise. It does not substantially increase the risk to allow the conversation to be recorded or to allow others to listen. The limitation drawn by Section 605 on the actions it prohibits is meaningful.

The statutory language, the authority of the Supreme Court, and sound public policy all support the decision of the court below. It is hereby

AFFIRMED.

A true copy

Test: s Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit.
New Orleans, Louisiana
February 6, 1962.

CERTIFICATE OF SERVICE.

I do hereby certify that true copies of the foregoing Petition for Writ of Certiorari of Ralph B. Carnes and Roger W. Smallwood were this date deposited in the United States Post Office, Gainesville, Georgia, with adequate postage, addressed as follows: The Solicitor General, Department of Justice, Washington 25, D. C.; Charles L. Goodson, United States Attorney, Old Post Office Building, Atlanta, Georgia.

This 8th day of March, 1962.

Of Counsel.

LIBRARY
SUPREME COURT, U.S.
FILED

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	6
Goldstein v. *United States*, 316 U.S. 114	6
Hale v. *Henkel*, 201 U.S. 43	6
Jones v. *United States*, 362 U.S. 257	6
Nardone v. *United States*, 302 U.S. 379	6
On Lee v. *United States*, 343 U.S. 747	8
Rathbun v. *United States*, 355 U.S. 107	6, 7, 8, 9, 10
Reitmeister v. *Reitmeister*, 162 F. 2d 691	10
Sorrells v. *United States*, 287 U.S. 435	8
United States v. *Polakoff*, 112 F. 2d 888, certiorari denied, 311 U.S. 653	10
United States v. *Yee Ping Jong*, 26 F. Supp. 69	9

Statutes:

	Page
Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. 151:	
Sec. 401	9
Sec. 502	9
Sec. 605	2, 6, 8, 9
18 U.S.C. 371	3
Internal Revenue Code of 1954 (26 U.S.C. (1952 ed., Supp. V)):	
Sec. 5008	3
Sec. 5174(a)	3
Sec. 5216	3
Sec. 5601	3
Sec. 5606	3
Sec. 5691	3
Sec. 7201	3
Sec. 7206	3

Miscellaneous:

In the Matter of Use of Recording Devices in Connection with Telephone Service, 11 F.C.C. 1033, 12 F.C.C. 1005, 12 F.C.C. 1008	8, 9
F.C.C. Public Notice 60591, dated March 28, 1951	9
Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165	9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 786

RALPH B. CARNES AND ROGER W. SMALLWOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 382–391; Pet. App. A3–A11) is reported at 295 F. 2d 598.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1961 (R. 392; Pet. App. A1), and a petition for rehearing was denied on January 11, 1962 (R. 409; Pet. App. A1). On February 1, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including March 12, 1962 (Pet. App. A2), and the petition was filed on March 9,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal officer's recording of a telephone conversation between himself and a person whom he has under investigation, without the person's knowledge, by a recording device attached to the earpiece of the officer's telephone instrument, constitutes the interception of a communication within the meaning of Section 605 of the Communications Act of 1934.

STATUTE INVOLVED

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605, provides in pertinent part:

> * * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

STATEMENT

Count 1 of a five-count indictment (R. 1–8), filed June 5, 1959, in the United States District Court for the Northern District of Georgia, charged petitioners and six other defendants with having conspired, from August 1 to November 30, 1958, to defraud the United States and to commit offenses against the United States pertaining to the manufacture, possession, transportation, distribution and sale of non-tax-paid

distilled spirits,[1] in violation of 18 U.S.C. 371 (R. 1–6). Counts 2 and 4 (R. 6, 7) charged petitioners and one of the other defendants, John Whitley, with possessing non-tax-paid distilled spirits and an unregistered distillery on September 10, 1958, in violation of Sections 5008 and 5601 of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed., Supp. V) 5008 and 5601). The remaining counts—3 and 5—did not involve either petitioner. Following a trial by jury, both petitioners were found guilty on the conspiracy count, and petitioner Smallwood was found guilty on counts 2 and 4 (R. 364).[2] Petitioner Carnes was sentenced to four years' imprisonment (R. 366–367). Smallwood was sentenced generally to three years' imprisonment and to pay a fine of $500 (R. 368–369). The United States Court of Appeals for the Fifth Circuit affirmed the convictions (R. 382–392; Pet. App. A1, A3–A11).

---

[1] The substantive offenses charged included violations of the following sections of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed., Supp. V)): Section 5008 (transporting, possessing, and selling distilled spirits in containers not bearing stamps evidencing compliance with internal revenue regulations), Sections 5174(a) and 5601 (possession of unregistered stills and distilling apparatus), Section 5216 (making mash fit for distillation in premises other than duly authorized distilleries), Section 5606 (carrying on the business of a distiller without having given bond), Section 5691 (carrying on the *business of a wholesale liquor dealer* without having paid the special tax required by law), Section 7206 (removing, depositing, and concealing distilled spirits in respect of which a tax is imposed, with intent to evade or defeat the tax), and Section 7201 (attempting to evade and defeat taxes on distilled spirits).

[2] Petitioner Carnes was acquitted by direction of the court on counts 2 and 4 (R. 363).

The evidence presented by the government at the trial may be summarized as follows:

On September 10, 1958, officers of the Alcohol and Tobacco Tax Division of the Treasury Department raided and destroyed a large non-registered still located adjacent to property owned by petitioner Smallwood. They discovered 403½ gallons of non-tax-paid whiskey in a nearby barn and rounded up several persons implicated in the operation of the still, including Smallwood and John Whitley, a co-defendant. Whitley, when arrested, was driving a truck owned by Smallwood, in which were 1,060 pounds of sugar and two tins of dry yeast, materials used in the operation of a still. A truck which had previously been seen in the possession of petitioner Carnes was found in the barn in which the whiskey was discovered. (R. 18–22, 24, 26–31, 39–41, 45–47, 50–51, 68–69, 89, 267–268, 331; G. Ex. 3, R. 118–119.)

Destruction of the still merely slowed down the participants' operations. On September 30, Atlanta policemen found Whitley driving an automobile containing 158 gallons of non-tax-paid whiskey (R. 82–83). During this period numerous telephone calls were made between a grocery supermarket operated by Carnes and the Smallwood residence (G. Exs. 4 and 7, R. 120, 130, 156–157, 186; R. 383; Pet. App. A4).

In October, John Wurtele, a special investigator for the Alcohol and Tobacco Tax Division, "posing as a transporter of non-tax-paid whiskey," communicated with Carnes through Whitley in an attempt to purchase whiskey from Carnes. His efforts were successful, and after a time Wurtele dealt with Carnes

directly. On October 7, 8, 10, and 27, Wurtele made four substantial purchases of non-tax-paid whiskey from Carnes, ranging in quantity from nine to sixteen cases, for which Wurtele paid associates of Carnes sums ranging from $161 to $288. (R. 193–201.) On October 30, other revenue officers, using the information obtained by Wurtele in the course of his October 27 purchase, located and destroyed the distillery from which that liquor had come (R. 148–151, 153–155, 201). A third still, at which Whitley was found working, was seized on November 26 (R. 134–135, 165–166).

On October 27, Wurtele called Carnes from an outdoors telephone booth. Referring to some whiskey which he had agreed to purchase, Wurtele asked Carnes if "the stuff" was ready. Carnes said it was, and Wurtele said he would arrive in 45 minutes to pick it up. (R. 200, 229.) On October 29, Wurtele again called Carnes, from a pay station in a building in Atlanta. Referring to another consignment of liquor which he had made arrangements to buy, Wurtele told Carnes that he was "afraid to come down and load up" because he had been stopped by "the law," and asked Carnes to "have the boys * * * hold the whiskey until Friday." Carnes "said that he would." (R. 201, 229.) Wurtele recorded both of these conversations with a "small midget-tape recorder that you connect to the telephone ear piece" (R. 200, 201, 206).[1] The recordings were received in evidence over objection (G. Ex. 8, R. 209, 214–217), and played to the jury (R. 220–221).

---

[1] The recordation process did not entail the cutting or splicing of any wires (R. 219).

ARGUMENT

Petitioners contend (Pet. 6–11) that it was error to admit in evidence the tape-recordings made by investigator Wurtele of his telephone conversations with petitioner Carnes on October 27 and 29, 1958.[4] They urge that the playing of these recordings at the trial involved the divulgence, in each instance, of an "intercepted communication" within the meaning of Section 605 of the Communications Act of 1934 (*supra*, p. 2), and hence was prohibited under the rule of *Nardone* v. *United States*, 302 U.S. 379. The argument is without merit.

The recording by Wurtele of his own conversations with Carnes did not involve the interception of a communication. As a party to the conversations, Wurtele had a right to divulge their content to whomever he chose. "The communication itself is not privileged," this Court observed in *Rathbun* v. *United States*, 355 U.S. 107, 110, "and one party may not force the other to secrecy merely by using a telephone." There can be no question that it was proper for the officer to testify from memory, as he did, to the relevant substance of what he said to the other party to these communications and what that party said to him. Petitioners do not contend otherwise. The officer's

[4] We shall assume, *arguendo*, that both petitioners had standing to object to the admission of the recordings, even though only petitioner Carnes was a party to the conversations and petitioner Smallwood was not mentioned or referred to, directly or indirectly, in either conversation (R. 220–221). But see *Goldstein* v. *United States*, 316 U.S. 114, 119–122; cf. *Jones* v. *United States*, 362 U.S. 257, 261; *Agnello* v. *United States*, 269 U.S. 20, 35; *Hale* v. *Henkel*, 201 U.S. 43, 70.

action in recording the conversations was no different, in legal effect, than if he had taken stenographic notes, or committed the conversations to memory, and thereafter testified to his communicant's exact words. In recording the conversations, he merely made permanent and reliable records of communications which, because he himself was a party to them, he was at liberty to publish to whom he chose.

These conclusions follow *a fortiori* from *Rathbun* v. *United States*, *supra*. At issue there was the admissibility of police officers' testimony of statements they heard the accused make by telephone to a third person by listening on an extension in the home of the third person, at the latter's request and without the knowledge of the accused. The Court, resolving a conflict which had arisen among the lower courts on the question, sustained the admissibility of the officers' testimony. It concluded (355 U.S. at 111):

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred. [Emphasis by the Court.]

In *Rathbun*, the police officers, from the point of view of the accused, were eavesdroppers on what the

---

The Court upheld what had been the majority view. (355 U.S. at 109, nn. 4 and 5). See also the opinion below at R. 385-388, Pet. App. A5-A8.

accused supposed was a private telephone conversation between himself and a third person. In the case at bar, no third person was involved. Investigator Wurtele was a party to the conversations. It is true that the other party was unaware that Wurtele was an undercover agent, engaged in the enforcement of the internal revenue laws. But the fact that Wurtele, in his relations with Carnes, had assumed the role of an interested purchaser of Carnes' non-tax-paid product did not affect the situation so far as the applicability of Section 605 of the Communications Act was concerned. That "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises" (*Sorrells* v. *United States*, 287 U.S. 435, 441) is well settled. The situation at bar is thus, in legal effect, not materially different than if the conversations had been face-to-face communications, recorded by a device concealed on Wurtele's person. Cf. *On Lee* v. *United States*, 343 U.S. 747. The fact that the conversations recorded were telephone conversations is without relevance.[8]

That the situation involved in the present case is controlled by *Rathbun* was, indeed, recognized by the Court in that case. The Court noted that it had been "conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it" (355 U.S. at 110).

---

[8] Neither in the courts below nor in this Court has any question been raised as to the possible applicability of regulations of the Federal Communications Commission concerning the use of telephone recording equipment; such equipment is required to contain a tone-warning device. See *In the Matter of Use of Recording*

Moreover, in the dissenting opinion in that case, it was acknowledged that a party to a telephone conversation could record it, either stenographically or mechanically, without thereby "intercepting" it within the meaning of Section 605 of the Communications Act (355 U.S. at 144).

Devices in Connection with Telephone Service, 11 F.C.C. 1033, 12 F.C.C. 1005, 12 F.C.C. 1008. Since the F.C.C. regulations purport only to regulate the tariff schedules of telephone companies, there is serious question whether they are applicable to the situation in the present case. Furthermore, it is not clear that the device used in the present case was covered by the F.C.C. regulations; the device was apparently an ordinary miniature tape recorder, a "small attachment" to which, located "where the microphone would normally fit", was placed on, or attached to, the exterior of the receiver end of the telephone instrument (see R. 206, 219, 226), permitting the voices to be recorded "by induction" (R. 219). Moreover, since the Commission's orders authorizing the use of telephone recording equipment apply only "in connection with interstate and foreign message toll telephone service" (12 F.C.C. at 1006), the intrastate phone calls in the present case may not be subject to the F.C.C. regulations (cf. Westin, *The Wire Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165, 181). It is also questionable whether a failure to use a tone warning device would subject the user to any enforcement proceedings (see 47 U.S.C. 501, 502); the only sanction might be the termination of service by the telephone company, which would be ineffective with respect to the user of the public telephone in the present case (see F.C.C. Public Notice 66591, dated March 28, 1951, p. 6). Finally, because the issue was not raised below, the evidence in the record does not describe the operation of the recording device used in the present case sufficiently for purposes of facilitating the consideration and resolution of any issue concerning the use of a tone warning device with telephone recording equipment.

Cf. *United States* v. *Fu Ping Jong*, 26 F. Supp. 69 (W. D. Pa.), where the court, in sustaining the admissibility of a phonographic recording of a telephone conversation between an accused and the interpreter of an undercover narcotics

To the extent that *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2), certiorari denied, 311 U.S. 653, and *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2), relied on by petitioners (Pet. 6–7, 10–11), can be said to be in conflict with the decision below,[7] their rationale has been disapproved by this Court in the *Rathbun* case,[8] and they accordingly no longer possess vitality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

APRIL 1962.

---

agent, made with the knowledge of the agent but not of the accused, observed that the recording "was, in effect, a mere recording of the conversation at one end of the line by one of the participants. It differed only in the method of recording from a transcription of a telephone conversation made by a participant" (*id.* at 70).

[7] But see this Court's observation in the *Rathbun* case, 355 U.S. 107, 110, that "[i]t has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it", for which the Court cited *United States* v. *Polakoff*, and in particular the acknowledgement in the *Polakoff* decision that "[t]he receiver [of a telephone communication] may certainly himself broadcast the message as he pleases * * *" (112 F. 2d at 889).

[8] See 355 U.S. at 109, and dissenting opinion at 114; cf. opinion below at R. 388–389, Pet. App. A8–A9.